IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 782 OF 2003

Dadasaheb Gundappa Vankudre,
Age about 75 years, Occupation:
Agriculture, residing at Plot
No.7, Kolhapur road, Behind Sangli
S.T.Stand, Sangli 416 416. .... Appellant.
(Org.Plaintiff.)

Versus.

Vasantrao Marutirao Sankpal,
Age about 71 years, Occupation:
Business, residing at Shirol,
Taluka Shirol, Dist. Kolhapur. .... Respondent.
(Org.Defendant.)

Shri S.G.Deshmukh for the Appellant.

Shri G.M.Savagave for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 30th August, 2004.

ORAL JUDGMENT.

1. Heard learned Counsel appearing for the parties. Grounds Nos.2 and 3 of the Memorandum of Appeal raise substantial questions of law. Instead of keeping the Second Appeal pending in this Court, considering the facts and circumstances of the case and with the consent of the Counsel appearing for the parties, I have taken up the Second Appeal for final hearing forthwith.

2. The appeal is by the original Plaintiff. The original Plaintiff claims to be the owner of the land bearing Gat No.419. The case of the Plaintiff is that the Respondent has made encroachment on the suit land. The suit was resisted by the Respondent by filing his Written Statement. The Respondent raised various contentions. The Respondent also disputed that the Appellant was the owner of land bearings Gat No.419. A specific contention was raised by the Respondent that he has erected poles/fencing in between his land and the land of the Appellant after getting his land surveyed.

3. The suit filed by the Appellant was dismissed by Judgment and order dated 30th November 1998. The said decree was challenged by the Appellant by preferring regular Civil Appeal No.22 of 1994 in the District Court. By Judgment and order dated 5th February 2000, the said Appeal was allowed by the learned Second Additional District Judge, Kolhapur. The learned Addl.District Judge held that the Appellant has proved that he was the owner of the suit land bearing Gat No.419 to the extent of 1 acre and 9 Ares. The Appellate Court however, remanded the suit to the trial Court by giving certain directions. The Appellate Court recorded that in the year 1988 one survey was carried

out by Cadestral Surveyor at the instance of the Appellant and another Cadestral Surveyor carried out survey at the instance of the Respondent in the year 1989. The Appellate Court also observed that the reports of the survey are at variance so far as the location of the boundary between the land held by the appellant and the land held by the Respondent is concerned. Therefore, in para 10 of the Judgment, the learned Appellate Court observed that it will be proper to remand the matter to the lower Court with a direction to appoint a higher authority of both the Cedestral Surveyors namely D.I.L.R. of Jaisingpur to measure both the lands and to submit his report by fixing boundary marks on the boundary of land bearing Gat No.419. Accordingly the following order was passed by the learned 2nd Addl.District Judge:

1. Appeal is partly allowed.
2. The impugned order is quashed and set aside.
3. Appeal is remanded back to the lower Court with direction to appoint D.I.L.R. of Jaysingpur as Commissioner to measure both the land vide Gat No.419 and 333 in presence of both the

parties, and he should be directed to submit his report as regards to the encroachment made by the respondent if any over land Gat No.419, after fixing the boundary land marks of Gat No.419 and 333.

4. Both the parties to bear equal charges required for measurement of the lands by D.I.L.R.

5. Charges are to be paid within 15 days.

6. Commissioner is directed to submit his report within three months, after receipt of letter by the lower Court.

7. The learned trial Judge to decide the matter within two months, after receipt of report from the Commissioner, appointed as directed supra.

8. Both the parties to remain present in the lower Court on dated 21.02.2000.

9. In the circumstance of the case, parties to bear their own costs.

10. Record and proceeding be sent back to the lower Court forthwith.

11. Decree be drawn accordingly.

It is an admitted position that after the order of remand was passed by the District Court survey was carried out again by the Cedestral Surveyor. An objection was raised on behalf of the Appellant about the survey carried out by the Cedestral Surveyor on the ground that as per the order of remand, D.I.L.R. himself should have carried out the survey. The said objection appears to be over-ruled by both the Courts below by observing that the measurement was carried out by the Cedestral Surveyor as per the order of the T.I.L.R. and that the parties did not deposit the measurement fees with T.I.L.R.

4. Both the trial Court dismissed the suit after remand by accepting the survey carried out by the Cedestral Surveyor. The appeal preferred by the Appellant in the District Court has also been dismissed.

5. Being aggrieved by the Judgments and Decrees passed by the Courts below the present Second Appeal has been preferred.

6. Shri Deshmukh, the learned Counsel appearing for the Appellant submitted that the order of remand was passed by the District Court earlier only because the District

Court found that the survey must be carried out by any Officer who is higher in rank of the Cedestral Surveyor. He, therefore, submitted that there was no compliance with the order of remand passed by the District Court which has attained finality. He relied upon the Civil Application No.724 of 2004 filed by the Appellant in which prayer is made to appoint T.I.L.R. for carrying out survey in terms of the earlier order of the District Court.

7. The learned Counsel for the Respondent submitted that the Courts below were absolutely right when the report of the Cadestral Surveyor prepared on the basis of the survey carried out by him was accepted. He submitted that the concerned Cadestral Surveyor has acted under the supervision of the D.I.L.R./T.I.L.R. He submitted that no interference was called for in the Second Appeal. He lastly submitted that in any event, this Court is inclined to accept the contention raised by the Appellant, instead of remanding the matter, a report may be called for from the D.I.L.R./T.I.L.R. by appointing him as Commissioner and thereafter, the Second Appeal may be decided on merits.

8. I have considered the rival submissions. Normally

the Civil Court appoints D.I.L.R./T.I.L.R. who are Survey Officers under the Maharashtra Land Revenue Code, 1966, to carry out survey for fixing boundaries of the immoveable properties. The actual work of doing survey and carrying out measurement is entrusted by the said Officers to the Surveyors working in their respective offices. However, in the facts of the present case, the order of remand was passed on 5th February 2000 after the District Court found that the survey carried out on two occasions by the Cadestral Surveyor showed different locations of the boundaries of the suit land. Therefore, the District Court specifically observed that some higher officer, namely the D.I.L.R.of Jainsingpur should measure the land. After recording the said finding, the order of remand was passed with a direction to appoint D.I.L.R. of Jaisingpur as Commissioner to measure both the lands bearing Gat No.419 and 333. In view of the specific finding recorded by the District Court by passing the order of remand which has attained finality, the D.I.L.R. should have carried out the work of commission with the assistance of his Officers and the members of the staff.

9. However, admittedly the survey is carried out after remand by the Cedestral Surveyor. It is, therefore,

obvious that the trial Court and the Appellate Court have not considered the purport of the order of remand passed on 5th February 2000. Therefore, the D.I.L.R. of Jaisingpur will have to be appointed as Commissioner as per the order of remand. I am informed that the office of the District Inspector of Land Records is no more in existence and now the higher Officer concerned is Taluka Inspector of Land Records. Therefore, Taluka Inspector of Land Records (TILR) will have to be appointed as Court Commissioner. After the report of the Court Commissioner is filed, both the parties will be entitled to file objections to the report of the Commissioner and the parties will be entitled to examine the Commissioner on oath. All this exercise cannot be done in the Second Appeal. Moreover finding of fact will have to be recorded after receipt of the Commissioner’s Report. Therefore, order of remand is inevitable.

10. It is very clear that both the Courts below have proceeded contrary to the express direction given by the learned 2nd Addl.District Judge, Kolhapur, by Judgment and order dated 5th February 2000. Therefore, the Judgment and Decrees passed by the Courts below are required to be interfered with under the provisions of

section 100 of the Code of Civil Procedure, 1908.

11. Hence the following order is passed:

(i) Second Appeal is allowed with no order as to costs. The impugned Judgments and Decrees are set aside.

(ii) Regular Civil Suit No.122 of 1992 is remanded to the trial Court for hearing the same afresh.

(iii) It is made clear that the Judgment and Order dated 5th February 2000 and the findings recorded in Regular Civil Appeal No.22 of 1994 are confirmed.

(iv) The trial Court is directed to appoint T.I.L.R. Jaisingpur, Dist. Kolhapur, to act as Commissioner in terms of the order dated 5th February 2000 passed in Reg.Civil Appeal No.22 of 1994. The work of the commissioner will have to be carried out by the T.I.L.R. himself with the assistance of the Surveyors and other

staff members attached to his office.

(v) After receiving the report from the T.I.L.R. the trial Court will decide the matter as per the directions given in the Judgment and Order dated 5th February 2000 in Reg.Civil Appeal No.22 of 1994.

(vi) The trial Court will issue notice of the date fixed to both the parties. The trial Court will decide the suit expeditiously.

(vii) Parties and the trial Court to act on the authenticated copy of the order.

Judge.